



**Onyango v Unity Micro Investment Limited & 2 others (Environment & Land
Case E030 of 2022) [2023] KEELC 16468 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E030 OF 2022**

**AE DENA, J
MARCH 20, 2023**

BETWEEN

BENARD ONYANGO PLAINTIFF

AND

UNITY MICRO INVESTMENT LIMITED 1ST DEFENDANT

EQUITY BANK LIMITED 2ND DEFENDANT

PURPLE ROYAL AUCTIONEERS 3RD DEFENDANT

RULING

This ruling is subject of the 2nd and 3rd Defendants application dated July 7, 2022 brought pursuant to the provisions of Order 2 Rule 15[1][a] of the *Civil Procedure Rules 2010* and seeks the following orders;

1. The suit against the 2nd and 3rd Defendants be struck out for disclosing no reasonable cause of action in law.
2. The costs of this application and the suit be awarded to the 2nd and 3rd Defendants.

2 The application is premised upon the grounds that the 1st Defendant is the registered owner of the suit property and not the Plaintiff as alleged and therefore does not have locus standi to bring the suit before court. That the Plaintiff is further not classified under Section 103[1] of the *Land Act* 2012 as one of the persons eligible to questioning the 2nd Defendants exercise of the statutory power of sale. The 2nd and 3rd Defendants state that they are not part of the agreement and undertaking referred to by the Plaintiff and therefore the suit against them offends the doctrine of privity of contract. That the 3rd Defendant being an agent of the 2nd Defendant cannot be sued except under certain circumstances which have not been pleaded by the Plaintiff. That the suit does not therefore outline any reasonable cause of action in law and the same should be dismissed.



Response

3. The application is opposed by a replying affidavit sworn on September 12, 2022 and filed before court on September 14, 2022. The deponent Benard Onyango and who is the Plaintiff avers that he is the owner of the suit property. He states that he only entered into an agreement and undertaking with the 1st Defendant in which the Plaintiff allowed the 1st Defendant to use his property as security for a loan. A copy of the agreement is attached to the affidavit. That the Plaintiff did not sell the suit property to the 1st Defendant and the plaintiff is further not responsible for the loan repayment. The plaintiff avers that the 1st Defendant should substitute the suit property with a parcel that they own. The plaintiff is apprehensive that he might lose his property if the application is allowed and prays that the same is dismissed.

Submissions

4. The 2nd and 3rd Defendants submissions are filed before court on September 20, 2022. The same curve out three issues for determination, Whether the Plaintiff has locus standi to sue the 2nd Defendant, Whether the suit offends the doctrine of privity of conduct and Whether the suit offends the rule against agent of disclosed principal.
5. On *locus standi* Mr Kongere learned counsel for the 2nd and 3rd Defendants rehashing the facts of the arrangement between the Plaintiff and the 1st defendant as pleaded by the Plaintiff submitted that, the Plaintiff has no right to the property as the same is not registered in his name. That section 26 of the [Land Registration Act](#) declares the certificate of title as prima facie evidence of ownership and in this regard the land belongs to the 1st Defendant. Reliance was placed on the case of [Quantum Petroleum Limited v Cooperative Bank of Kenya Ltd](#) [2021] eKLR, and [Maxvictor Entreprises Limited v Gulf African Bank Limited & Another](#) [2020] eKLR where the court stated that the only person with a legitimate complaint over exercise of a statutory power of sale is the bank. The Plaintiff has referred to several other authorities which this court has read. It is concluded that from the facts of this case and the case law provided the Plaintiff lacks locus standi to question the exercise of the Banks statutory power of sale.
6. On whether the suit offends the doctrine of privity of contract it is submitted that the Plaintiff has failed to demonstrate that the 2nd Defendant is a party to the contract between him and the 1st Defendant or that he is a party to the charge. That a contract cannot confer rights or obligations to a party unless they are party of the same. It is urged that the 3rd defendant is an agent of the 2nd Defendant and had been instructed to sale the suit property. That the Plaintiff being privity of this still proceeded to file suit against the 3rd defendant who is but an agent. That since the principal is disclosed, the agent shouldn't have been sued as was discussed in [Victor Mabachi & Another v Nurtun Bates Limited](#) [2013] eKLR. The court is urged to allow the application with costs.

Plaintiffs Submissions

7. The Plaintiff's submissions define what a reasonable cause of action should be as was stated in [DT Dobie & Co Ltd v Muchina](#) [1982] KLR. The same is defined as an action with some chance of success when allegations in the plaint only are considered. The court is further referred to the holding in [Crescent Construction Co Ltd Versus Delphis Bank Limited](#) [2007] eKLR where the court of appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings. The Plaintiff submits that the suit has disclosed a cause of action by producing an agreement to show that he did not sale the suit property to the 1st Defendant which means he has every



right to defend his property. The court is asked to dismiss the application in order for the real issues in the suit to be determined.

Determination

8. I have considered the application, the grounds in support and those in opposition. I have further considered submissions on record and the decisions relied on. The main issue for determination is whether this application has met the threshold set out by Order 2 rule 15 of the Civil Procedure Rules which provides as follows:

“ 15.

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a) it discloses no reasonable cause of action or defence in law; or
- b) it is scandalous, frivolous or vexatious; or
- c) it may prejudice, embarrass or delay the fair trial of the action; or
- d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

9. It is the 2nd and 3rd Respondents case that the Plaintiff has no locus standi to bring the suit before court as he is not the registered owner of the suit property. It is stated that the suit property was transferred to the 1st Defendant and hence the proprietary rights over the same were relinquished to the 1st Defendant. According to the Plaintiff, the land was not sold to the 1st defendant but was only leased to them over a certain period of time. The purpose of the lease was to enable them obtain a loan facility from the 2nd Defendant and the same necessitated having them registered as the owners of the suit property.
10. I have perused the plaint filed in this matter, the same is dated July 4, 2022. The Plaintiff prays for judgement against the defendants for orders of permanent injunction from dealing with the suit property in any manner whatsoever and costs of the suit. I have also perused the contents of the agreement and undertaking between the Plaintiff and the 1st Defendant, it is stated that the 1st Defendant is to use the suit parcel as collateral for a period of 5 years and may enter into a further agreement at the lapse of the same. The obligations of the parties are listed and which include transfer of the property to the 1st defendant. It is stated in the agreement that in the event of default of the loan repayment the parties are bound into entering a sale agreement of the suit property for a sum of Kshs 30,000,000/-. From the contents of the agreement, clearly the obligations are to be performed by the Plaintiff and the 1st Defendant as prescribed and settled in the agreement. The 2nd and 3rd Defendants were not privy to the terms set out and only transacted with the 1st Defendant on the basis of the transfer and register reflecting the 1st Defendant as the registered proprietor. Even in ordinary conveyancing this is the position. The only exception I have seen is where sister companies can use titles for the other to obtain facilities but this is not the case in the present arrangements. Indeed, a copy of the title deed has been annexed to the plaintiffs' pleadings, the same bears the name of the 1st Defendant as the absolute proprietors. The Plaintiff only features in the agreement but with the conditions set on the same. To me therefore his only relief is from the 1st Defendant and not the rest of the Defendants.
11. As a general rule, a contract affects only parties to it as seen in the doctrine of privity of contract. The loan advancement was between the 1st Defendant and the 2nd defendant, the plaintiff does not feature



anywhere in the same. In as much as the Plaintiff has tried to demonstrate his relationship with the 1st Defendant and the suit property, he was not part of the agreement between the 1st Defendant and the 2nd Defendant, similarly the 2nd and 3rd Defendants were not part of the contract between him and the 1st Defendant. The court cannot rewrite the terms of all these contracts so as to include the parties herein as it is being assumed by the Plaintiff. This court is guided by the holding in *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR where the court pronounced itself as follows:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

There is no privity of contract and I respectfully agree with learned Counsel for the applicants.

12. Ms. Onyango learned counsel for the Plaintiff has implored that the suit discloses a reasonable course of action with some chances of success and should not be struck out. The court was also urged to proceed with caution at exercising its discretionary power to strike out. I note that Order 2 rule 15 of the Civil Procedure Rules gives an option for the court to either order amendment or striking out and I think the former is the basis upon which the oxygen principle is applied to infuse some life into the suit if it is not so hopeless see *Yaya Towers Limited vs. Trade Bank Limited* (In Liquidation) Civil Appeal No 35 of 2000. However, from the reliefs sought in the plaint herein they can only be granted based on the evidence that will be availed by the Plaintiff. The reliefs will however be against the 1st Defendant for this is where the cause of action lies and not the 2nd and 3rd Defendants as the latter did not enter into any contract with the Plaintiff.
13. I must explain the reasons for the delay of delivery of this ruling which was initially scheduled for December 5, 2022. However, when the court retired to write the same the application the subject of the ruling was not in the court file. I directed the registry to obtain the same. On December 5, 22 I informed Mr Kongere for the applicant about the missing application and he undertook to supply. I directed that the same be supplied by December 9, 22 and reserved the ruling to be on notice. Thereafter there was the ELC at 10 conference and then the Christmas recess. I also proceeded on annual leave and reported back on January 23, 23. The same appears to have been supplied but there is no record as to the date. The file was placed before me on March 15, 22 with the explanation that it was forgotten. Upon receipt of the same I prioritized it and the same was ready on March 16, 22. This was a lapse on the part of the Registry and this court apologizes to counsel.

Conclusion

14. The upshot of the discussion is that the application to strike out the suit against the 2nd and 3rd Defendants is hereby allowed with costs. The Plaintiff's suit shall proceed against the 1st defendant but with the region site amendments. For the avoidance of doubt the interim orders issued on July 4, 2022 be and are hereby vacated.

DELIVERED AND DATED AT KWALE THIS 20TH DAY OF MARCH, 2023

A E DENA

JUDGE



Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Kongere for applicants/defendants

Ms Onyango for the respondents/plaintiffs

Mr Disii - Court Assistant.

